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No. 211

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

LINCOLN MILLS OF ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The District Court did not issue an opinion. Its Findings of Fact and Conclusions of Law are set forth at pp. 33-36 of the record. The opinion of the Court of Appeals (R. 43-70) is reported in 230 F. 2d 81.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1956 (R. 131). On April 19, 1956, Mr. Justice Burton extended the time for filing a petition for certiorari to June 29, 1956 (R. 71). The petition was filed on June 28, 1956, and granted on October 8, 1956. (R. 71; 352 U.S. 821). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 136, provides, in pertinent part, as follows:

> Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The pertinent provisions of the United States Arbitration Act, 9 U.S.C. §§ 1-14, 61 Stat. 669, and of the Norris-LaGuardia Act 29 U.S.C. §§ 101-115, 47 Stat. 70 are set forth in Appendix A *infra*, pp. 62-71.

QUESTIONS PRESENTED

1. The ultimate question presented by the decision of the Court of Appeals is whether a federal district court has authority, in a suit brought by a union under § 301 (a) of the Labor-Management Relations Act, 1947, to compel compliance by an employer with his contract to arbitrate disputes arising under a collective bargaining agreement with the union.

2. Subsidiary questions, involved in determination of this ultimate question, are:

(a) Whether the court has jurisdiction over the suit under § 301 (a).

(b) Whether the Norris-LaGuardia Act prevents the granting of the relief sought.

(c) Whether reference is to be made to state or federal law to determine the enforceability of contracts to arbitrate.

(d) Whether § 301(a) itself, in the context of the Labor-Management Relations Act, makes such contracts enforceable in the Federal Courts.

(e) Whether the United States Arbitration Act (9 U.S.C. §§ 1-14) is applicable and, if it would be otherwise applicable, whether a collective bargaining agreement is excluded from its coverage as a "contract of employment."

STATEMENT

The petitioner, Textile Workers Union of America (hereinafter referred to as the Union), is a labor organization representing the employees of the respondent, Lincoln Mills of Alabama (hereinafter referred to as the Company). Lincoln Mills is a corporation owning and operating a textile mill in Huntsville, Alabama. It is engaged in an industry affecting commerce and is subject to the Labor-Management Relations Act, 1947.

In June, 1953, the parties entered into a collective bargaining agreement. (R. 4-18). This agreement, like most such agreements, established the wages, hours and other conditions of employment which would prevail during its term. It provided that during its term there would be no strikes, work stoppages or intentional slowdowns in view of the agreement between the Company and the Union that "the grievance procedures provided herein are adequate to provide a fair and final determination of all grievances . . . . (R. 15)." The grievance procedures thus referred to set forth three steps of discussion between Union and Company representatives at various levels over any dispute "arising from the operation or interpretation of this agreement." (R 13). The fourth step of the procedure was arbitration. (R. 14, 16).

The agreement provided that any "dispute between the Union and the Employer arising from the operation or interpretation of this agreement which pertains to wages, rates of pay, hours of work or other conditions of employment

which has not been satisfactorily adjusted" in the earlier steps of the grievance procedure could be submitted to arbitration by either party. The party desiring arbitration simply notified the other party within a specified time limit. Then, under the agreement, the parties were to confer and endeavor to agree upon the selection of an arbitrator. In the event of failure to agree, an arbitrator was to be chosen by a pre-arranged method from a list to be supplied by the American Arbitration Association.

The controversy in this case involves 10 grievances filed by employees in the first step of the grievance procedure in June, 1954. These grievances principally concerned work loads and work assignments, a subject covered by the provisions of Article V of the agreement (R. 11-13). The general nature of the complaints was that the company had assigned additional duties to the complaining employees and had reduced the number of employees to do specific jobs.[1]

Under Article V of the agreement the Company had the right to make such changes "based on sound management, engineering principles and practices" upon written notice. There then followed a four-week trial period, during which the employees were obliged to cooperate "in order to give the changes a reasonable and fair test." At the end of the trial period, either the affected employee or the Union was entitled to file a grievance. If such a grievance was not settled and was taken to arbitration, the parties specified that the decision was to be based upon the Company's detailed standards and studies and the union's objections to them as measured by the general principles set forth in the agreement. In the arbitration article of the agreement a method was provided by which grievances relating to work loads and assignments would be arbitrated by "qualified textile technicians or persons who by prior experience or training" were qualified to decide the question (R. 17).

[1] The individual grievances are set forth on pp. 19-28 of the record.

The grievances were processed by the Union through the various steps of the grievance procedure set forth in the Agreement. They were finally denied by the Company in the third step of the grievance procedure on July 14, July 15 and July 22, 1954. The collective bargaining agreement had expired, pursuant to notice given under its terms, on July 3, 1954 (R. 34).

The Union then requested the Company to submit the grievances to arbitration as provided for in the collective bargaining agreement. The employer refused (R. 34). The Union thereupon brought this suit against the Company asking for an order directing the Company to perform its obligation to arbitrate and asking, in addition, for damages.

The Company conceded the facts (R. 31-32) and defended on two principal grounds: (1) that the contract had expired and hence the agreement to arbitrate could no longer be enforced, and (2) the court was without jurisdiction to grant the relief requested.

The District Court on April 29, 1955, issued its findings of fact and conclusions of law. (R. 33-36). The Court concluded that it had jurisdiction and that the Union had a right to maintain an action to compel arbitration by virtue of the provisions of Section 301(a) of the Labor Management Relations Act of 1947. The expiration of the collective bargaining agreement, the Court held, did not relieve the Company of its obligation to arbitrate, particularly in view of the fact that the grievances were in fact processed through the first three steps of the grievance procedure up to the point of arbitration after the expiration of the agreement. With respect to the claim for damages, the District Court held that the Union had not proven any damages and was not entitled to recover.

On the basis of these findings and conclusions, the District Court ordered the Company to comply with the arbitration provisions of the collective bargaining agreement. (R. 36).

On appeal, the Court of Appeals reversed by a 2-1 vote. The opinion for the majority (R. 43) was delivered by Judge Jones and the dissent (R. 50) by Judge Brown.

All of the judges were agreed that the District Court had jurisdiction over the suit under Section 301(a) (R. 45, 55). They also expressly agreed that the Norris-LaGuardia Act did not prevent the issuance of the order which had been entered by the District Court (R. 46, 60).

The majority held, however, that in a suit brought under Section 301 an executory agreement to submit disputes to arbitration would not be specifically enforced in the absence of a showing that such agreements were specifically enforceable in the courts of Alabama. In reaching this conclusion, the majority first concluded that the U. S. Arbitration Act does not authorize enforcement of arbitration provisions in collective bargaining agreements. It then proceeded to consider whether Seciton 301(a) itself could be regarded as providing a basis upon which such agreements could be enforced. In the light of the opinions of the justices of this Court in the *Westinghouse* case, 348 U.S. 437, the majority concluded that Section 301(a) was procedural only and created neither a substantive right nor a substantive remedy. Finding that neither the Federal common law nor the common law of the State of Alabama authorized the specific enforcement of agreements to arbitrate, the Court concluded that there was no basis upon which it could enforce such an agreement in this case. In view of that holding, it expressly waived consideration of the question of whether the agreement to arbitrate could otherwise be enforced after the termination of the agreement.

Judge Brown, in his dissent, assumed with the majority that Alabama would not specifically enforce an agreement to arbitrate. He also assumed that the United States Arbitration Act was not available to give specific statutory authorization for a federal remedy. He argued, however, that the injunctive relief sought was both common and tradi-

tional. In the light of the plain congressional policy in favor of arbitration in labor matters, he argued that the Federal District Courts, having been given jurisdiction by Section 301, were free to grant the relief requested as part of their traditional and inherent powers. In addition, he argued, a basis for issuing an order directing the employer to comply with his contractual commitment to arbitrate could be found by using Section 301 "in a modified substantive way". "The agreement to arbitrate," he said, "for employer and employees alike, goes to the very heart of the collective contract. The native forces of competing economic pressures are held in leash by it. Repudiation by either is a challenge which § 301 sought to answer. If it is not available here, then nought is left of § 301 but the right to sue for money damages. Had that been the narrow hope of Congress, just such simple words would have been used." (R. 69-90).

SUMMARY OF ARGUMENT

I. The District Court clearly had jurisdiction over the cause of action under Section 301(a). Here, unlike *Westinghouse,* the claim is not for the payment of wages to individual employees but a claim that the employer has refused to perform his agreement with the union, as such, to arbitrate. Furthermore, utilization of Section 301(a) here would not provide, as in *Westinghouse,* an alternative method to the one specified in the collective agreement for the resolution of disputes but would, rather, compel the parties to utilize the procedure upon which they have agreed.

II. The District Court had power to grant equitable relief. Section 301(a) is a general grant of jurisdiction and is not limited to suits for damages. This is the plain meaning of its language and must be the construction to be given it, since a limitation to damage suits would in effect eliminate all union suits under a statute expressly permitting suits by unions.

III. The Norris-LaGuardia Act does not prevent the granting of equitable relief although this is a "labor dispute" within the meaning of the Act. The only provision of the Norris-LaGuardia Act which can be argued to be applicable here is Section 7. But Section 7, when read in conjunction with the rest of the Act, plainly is the procedural counterpart of Section 4 and is intended to apply only to requests for injunctive relief which, absent allegations of fraud, violence, or illegality, Section 4 would prohibit. This construction of Section 7 avoids a nonsensical result and is in accord with the prior decisions of this Court.

IV. If the above propositions are correct, the only bar to the relief granted by the District Court here is the common-law rule against the enforcement of executory agreements to arbitrate. That rule is properly applicable only to commercial arbitration since the premise upon which it is based is that arbitration is a substitute for litigation.

Labor arbitration, unlike commercial arbitration, is not a substitute for litigation. It is a substitute for a strike. This is clearest in the case of an arbitration which is agreed upon as a method of settling a strike as to what the terms and conditions of employment shall be. It is equally true of grievance arbitration—the arbitration of differences as to the meaning and application of a collective agreement.

The nature of grievance arbitration, and its distinction from commercial arbitration, is particularly clear in this case. The parties dealt with strikes during the term of the agreement and with arbitration as two sides of the same coin. The agreement that there should be no strikes was expressly made on the basis of the establishment of a grievance and arbitration procedure for the settlement of all differences as to the meaning or application of the agreement.

V. The difference between commercial arbitration and grievance arbitration is a sufficient basis upon which to hold the traditional rule against the enforcement of commercial

arbitration agreements to be inapplicable. If it is inapplicable, the District Court having jurisdiction over the suit and the parties and having the power to grant equitable relief, had the necessary power to grant specific performance. This was the view of Judge Brown, dissenting, below and we concur with it.

If a specific statutory basis is required, Section 301(a) provides that basis. The Congressional purpose in enacting Section 301(a) was to insure industrial peace by providing a remedy in cases in which no strike agreements were violated. The agreement to arbitrate disputes arising during the term of a collective agreement is the consideration for and necessary counterpart of the agreement not to strike. The two are essentially one clause. And Congress left no doubt that it intended both parties to have access to the Federal Court in cases in which such a clause was not performed.

It is true that no specific consideration was given to the arbitration side of the no-strike clause. But this is because the sponsors of the legislation did not examine any case in which an employer refused to abide by a collective agreement. They believed that only unions violated such provisions. They intended, however, to give a remedy to both sides. And if any fair meaning is to be given to Section 301(a) it must therefore be construed as protecting both the employer and union interest in the reciprocal no-strike arbitration provision. The employer's interest can be protected by permitting him to recover the financial damages which he may suffer as a result of a violation of the agreement not to strike. The union's interest can only be protected by specific performance of the reciprocal agreement to arbitrate.

VI. Reliance on Section 301(a) as the statutory basis for granting specific performance of the agreement to arbitrate grievances creates no practical problems of significance. Contrary to Judge Magruder's opinion in the *General Electric* case, the procedural specifications and safeguards of a

typical arbitration statute are neither necessary nor, indeed, very appropriate to grievance arbitration. They are contained in arbitration statutes because such statutes are designed for commercial arbitration used as a substitute for litigation. They envisage a proceeding, much like that before a master appointed by a court, which terminates in a judgment as to money damages. Grievance arbitration serves a different purpose and normally culminates in a different result.

VII. In our view of Section 301(a) there is no constitutional problem since the Section is construed as providing for the substantive enforceability of the agreement to arbitrate. In any case, it is improper to distort the expressed intention of Congress to provide equal enforcement of rights in order to avoid a constitutional question which will have to be met and decided in a case in which an employer recovers damages against a union.

The same considerations apply to the forum-shopping problems and the federal-state problems mentioned in Mr. Justice Frankfurter's opinion in the *Westinghouse* case. All are equally applicable to suits which Congress clearly intended employers to be able to bring in the Federal Courts. Since it is impossible to construe Section 301(a) as eliminating these problems when an employer sues, the scope of a union's remedy under Section 301(a) should not be reduced in order to avoid these problems.

VIII. If our argument that grievance arbitration is sufficiently different from commercial arbitration as to justify a holding that the common law rule against specific performance is inapplicable is not accepted then the same result must be reached by virtue of the United States Arbitration Act in accordance with the opinion of the First Circuit in the *General Electric* case. The Arbitration Act was intended to abolish the common law rule in the Federal Courts. It would be incongruous to hold that grievance arbitration is

the only surviving victim of a rule which no longer exists in the area of its proper applicability unless there was the clearest evidence that Congress intended this result. No such evidence exists.

Grievance arbitration was, in fact, practically unknown when the Arbitration Act was passed and could not have been intended to be excluded. Congress did exclude arbitration provisions in contracts of employment. The history of the opposition by the International Seamen's Union to the Act as originally drafted makes it clear that this exemption was intended to exclude individual contracts of hire. If, despite this history, it is concluded that a collective agreement should be considered a contract of employment, then the exclusion from the Act of contracts of employment should be limited to workers engaged in foreign or interstate commerce, in accordance with the conclusion of the Second and Third Circuits.

No problem is presented by the provision, in Section 4 of the Arbitration Act, that an order directing arbitration can only be granted by a District Court which save for the agreement to arbitrate would have jurisdiction. The claims involved in this case are clearly not the kind of claims which are excluded from the scope of Section 301(a) by the decision of this Court in the *Westinghouse* case.

ARGUMENT

I—THE DISTRICT COURT HAD JURISDICTION.

In none of the three cases which the court now has before it, nor in any of the cases in the other circuits in which the question has arisen as to whether arbitration can be compelled in a suit brought under Section 301 of the Labor-Management Relations Act, has any court expressed doubt that it had jurisdiction over the cause of action. The Court of Appeals for the Fifth Circuit in this case did come to the ultimate conclusion that the District Court had no power to

grant the relief requested by the union, but it specifically held that it did have jurisdiction over the case (R. 45).

Despite this unanimity of opinion, the question of jurisdiction is so central to our argument, and this Court's decision in *Association of Westinghouse Employees* v. *Westinghouse Corp.*, 348 U.S. 437 (1955), is so recent, that it seems desirable to present briefly the consideration which we believe support the conclusion of the court below that it have jurisdiction.

Section 301(*a*) provides that the federal district court shall have jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . . ." Section 301(*b*) provides, in part, that "any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." Section 301 (*b*) clearly establishes the proposition that when a union is brought before a federal district court in a case over which the court otherwise has jurisdiction it shall be treated procedurally as though it were a natural or corporate entity, irrespective of the fact that at common law it could not be so considered because it was an unincorporated association. It thus supplies the procedural remedy for what was thought by Congress to be the principal obstacle to suits involving unions.

Section 301 (*a*), equally clearly, does something more than Section 301 (*b*). It provides, in terms as simple as it is possible to write, that the federal district courts shall have jurisdiction over suits for breach of contract between the unions and employers subject to the National Labor Relations Act. It thus supplies the basis upon which the District Courts may take jurisdiction and apply the procedural rules set forth in 301 (b).

This is, beyond question, a suit for breach of contract between an employer and a labor union subject to the national Act. It meets all of the requirements of 301 (a).

The only possible doubt as to the District Court's jurisdiction, therefore, must come from the gloss on Section 301 which was written by the Justices of the Court in the *Westinghouse* case.

In *Westinghouse* the union filed a complaint charging that the employer had failed and refused to pay to employees certain wages alleged to be due under the terms of the collective agreement and asking that he be compelled to make these payments. This Court held that there was no jurisdiction over such a complaint under Section 301. We will not attempt to restate the reasoning which led six Justices of this Court, in three separate opinions, to come to this conclusion. It is sufficient, we believe, to recall simply that in the opinion of three Justices (Frankfurter, Burton, and Minton), this result was dictated by the fact that the suit was "based upon an employer's failure to comply with the terms of collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." 348 U.S. at 460. In the opinion of two other Justices (Warren, Clark), the suit failed because its subject matter was "the uniquely personal right of an employee . . . . to receive compensation for services rendered his employer." 348 U.S. at 461. In the opinion of the sixth Justice (Reed) who concurred in the result, the reason was that the breach alleged—the failure to pay wages—was a violation only of the "separate hiring contracts between the employer and each employee, a situation not believed by the Justice to be covered by the statute. 348 U.S. at 464.

Some of the opinions, of course, contained language expressing more broadly applicable theories as to the meaning and scope of Section 301. But there was no opinion of the Court and the theories expressed in the three concurring opinions converged only on the narrow proposition that there was no jurisdiction over a complaint in which a union

plaintiff alleged simply that the employer had failed to pay to the employees the wages required by the collective agreement.

That proposition is plainly inapplicable to this case.[2] Here the suit is based on the failure of the employer to comply with the provisions of the agreement relating to arbitration, provisions which run to the union as such by the terms of the agreement and which, when violated, give a cause of action only to the union. The collective agreement itself specifies that the arbitration provision only applies to disagreements or disputes "between the Union and the Employer" (R. 16) and that it may be invoked "by either party" to the agreement (R. 17). Indeed, under the contract, a grievance can only arrive at the posture at which arbitration is provided for if the union, through its "General Shop Committee" in Step 2, and its "representative" in Step 3, has processed it through these earlier steps of the grievance procedure. This is, as Judge Brown below said, "on all tests, a *union* controversy in which the union is asserting in its collective capacity a demand relating to all of the employees as a group . . ." (R. 55; emphasis in original).

There is a further distinction between this case and *Westinghouse,* a distinction which rests upon a difference between the contracts sued upon rather than upon the kind of relief requested. In *Westinghouse,* the contract between the employer and the union was of the kind which, while once perhaps frequent, has now become increasingly raer: It provided for grievances as to the application and in-

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[2] We think it would also be inapplicable to a case in which the complaint did not simply allege a failure to pay compensation, as in Westinghouse, but also alleged that such failure to pay resulted from the adoption by the employer of a uniform rule of interpretation of the *collective* agreement contrary to that claimed to be applicable by the other party to that agreement—the union. See *United Steelworkers of America* v. *Pullman Standard Car Co.,* 37 LRRM 2696 (W.D. Pa. 1956) now pending in the Court of Appeals for the Third Circuit, Docket No. 11,894.

terpretation of the agreement but it did not provide for any final settlement of such grievances if the union and the employer were unable to agree. Instead, the contract provided that if any grievance could not be settled by negotiation the union would have the right to strike in support of its position.[3] The question in *Westinghouse,* then, was whether Section 301 should be read as giving the union the additional right to bring suit, instead of striking, over unresolved grievances.

In this case, on the other hand, as in the other cases now before the Court, the parties have provided a method for settling grievances which they cannot resolve. As in more than 90% of the collective agreements in force today,[4] the agreement provides that if the parties cannot settle a grievance they will submit it to arbitration. The question here, then, is not whether § 301 should be read as supplying a method of settling grievances above and beyond that provided in the collective agreement. The question here is whether the Court will, in a § 301 proceeding, require the parties to utilize the procedure which they have previously agreed shall be used for that purpose.

We conclude, therefore, that whatever other significance the opinions in the *Westinghouse* case may have for the result here, they plainly do not take this case out of the explicit statutory grant of jurisdiction which is set forth in Section 301(a).

II—APART FROM THE NORRIS-LaGUARDIA ACT, THE DISTRICT COURT HAD POWER TO GRANT EQUITABLE RELIEF.

As in the case of jurisdiction, all the circuit courts seem agreed that a district court has power in a suit brought

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[3] Record, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, No. 51, October Term, 1954, p. 32.

[4] *Arbitration Provisions in Collective Agreements, 1952,* 76 Monthly Labor Review 261 (1953); Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* 51:7 (1956).

under Section 301 to grant equitable relief. Whether that power is restricted, and to what extent, by the Norris-La Guardia Act and by common law doctrines relating to the enforceability of agreements to arbitrate we will consider below. Here we concern ourselves only with the simple question of whether there is anything in Section 301 which would lead to the conclusion that, irrespective of these problems, no equitable relief can be granted.

The answer to this question seems so clear that there is little reason to discuss it at length. Congress, in the same statute, indeed in the same title, clearly indicated that it knew how to provide for actions in which only damages could be given. In Section 303, it provided that persons injured by certain kinds of secondary boycotts could sue in any district court of the United States, subject to the provisions of Section 301 and, in such case, should "recover the damages by him sustained and the cost of the suit." In contrast, Section 301 itself provides, without limitation or qualification, that "suits" may be brought in the district courts of the United States for violation of collective agreements.[5] Every court of appeals, including the court below in this case and the First Circuit in the *General Electric* and *Goodall-Sanford* cases, Nos. 276 and 262, which has had occasion to pass upon the point has agreed that this unambiguous language cannot be read as limited to actions at law for damages. *AFL* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (6th cir. 1950); *Milk and Ice Cream Drivers*

[5] In the *Westinghouse* case, Mr. Justice Frankfurter's opinion found significance in the differences between Section 10 of the Case bill which was passed but vetoed in 1946 and Section 301(a) of the Taft-Hartley Act. The language of the Case bill, the opinion concedes, gave support to the view that a federal cause of action was to be created. 348 U. S. at 445. Changes in the subsequently drafted §301 (a) were therefore believed to argue against that view. Similar reasoning supports our argument that equitable relief is encompassed within the language of Section 301(a). For the Case bill conspicuously authorized only a "suit for damages" while Section 301(a) encompasses, without restriction, "suits for violation of contracts."

Union v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (6th cir. 1953); *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529, 534 (4th cir. 1951). See also *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953).

To this list must be added, of course, this Court's decision in the *Westinghouse* case. Whatever else may be said about that decision, it did not hold that the relief there sought—on order directing the employer to make an accounting and to pay over to the employees the moneys shown thereby to be due—was not available because it was equitable in nature. All of the Justices seemed to be in agreement at least on the point of not finding this to be a reason why the action could not be maintained.

Any other conclusion, furthermore, would totally eliminate from the purview of Section 301(a) any suits by unions, despite the express language of the section that suits may be brought by both unions and employers and despite the expressed intention of Congress to make collective agreements "equally binding and enforceable on both parties."[6] This Court has already held in the *Westinghouse* case that a union cannot sue to recover moneys due to employees under the terms of a collective agreement. Even if we assume that such a suit is the same thing as an action for damages, which it is not, there are left only the promises to the union as such to be vindicated in a union suit under Section 301(a). But, with the lone exception of the payment of dues checked off by the employer, an employer normally does not make any promise to the union, as such, which can be vindicated in an action at law.[7] The very nature of the relationship between employer, employee and union is such that a claim for relief for promises made to the union

[6] S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1947) P. 15.

[7] Indeed, even with respect to the check-off, the appropriate relief in the case of a refusal to transmit dues collected would be the equitable remedy of an accounting, not a suit for damages.

must necessarily be equitable in nature; the unions damages in case of a breach of the collective agreement are never of the kind which are compensable in specific monetary terms.

III—THE NORRIS-LA GUARDIA ACT DOES NOT BAR THE EQUITABLE RELIEF REQUESTED HERE

As with our first two points, there is substantial unanimity among the circuit courts of appeal that the Norris-La Guardia Act does not stand in the way of the relief sought here. The point was discussed in the argument of the case in the court below and summarily disposed of (R. 46). Joining the Fifth Circuit in this conclusion are the First Circuit in the *General Electric* and *Goodall-Sanford* cases, Nos. 276 and 262; and the Sixth Circuit in the *Milk and Ice Cream Drivers Union* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (1953), and in *Local 19* v. *Buckeye Cotton Oil Co.*, 236 F. 2d 776 (1956).

This unanimity is fully justified. Any contention to the contrary would involve such a gross distortion of the background, history, and acknowledged purpose of the Norris-LaGuardia Act as to be unthinkable. The policy and purposes of the Norris-LaGuardia Act are fully stated in Section 2. It is sufficient to quote it to set at rest any contention that the Act should be construed as forbidding the kind of relief requested here:

> "It is necessary that [the individual worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and lim-

itations upon the jurisdiction and authority of the courts of the United States are enacted."

That a statute with this stated purpose should not sensibly be applied to prevent the issuance of an order directing performance of an agreement to arbitrate is further buttressed by this court's disposition of similar contentions when they were offered in an attempt to prevent the issuance of injunctive relief to prevent violation of the provisions of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation,* 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232 (1949). As Mr. Justice Jackson said for a unanimous court in the *Graham* case, to construe the Norris-LaGuardia Act to deprive the federal courts of jurisdiction "would be to strike from labor's hands the sole judicial weapon it may employ to enforce such rights as these petitioners assert and which we have held are now secured to them by federal statute." It "would indeed be to 'turn the blade inward'." 338 U.S. at 237.

That this rejection of the applicability of the Norris-LaGuardia Act was not conditioned by special provisions in the Railway Labor Act having no applicability to workers subject to the National Labor Relations Act is plainly demonstrated by this Court's decisions in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953) and *Syres* v. *Oil Workers Union,* 350 U.S. 892 (1955). Although, as petitioners point out in the *General Electric* case, No. 276, the Court in neither of these cases expressly rejected the contention that its earlier holding was limited to Railway Labor Act cases, the disposition of both these cases, and the omission of any discussion of the Norris-LaGuardia Act, should make it clear that the Court did not regard Norris-LaGuardia as posing any bar to the relief sought.

The considerations we have mentioned make clear, we believe, the result which must be reached on this point. They do not, however, detail the precise mechanism by which the power of a court to grant equitable relief is to be

fitted into the particular provisions of the Norris-LaGuardia Act. On this question we think that Judge Magruder's opinion for the First Circuit in the *General Electric* case provides the key.

Judge Magruder did not hold, and we do not urge, that this is not a "labor dispute" within the definitions set forth in Section 13 of the Norris-LaGuardia Act. We do not, in other words, tender an invitation similar to that tendered by the Brotherhood and rejected by the court in *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232, 238 (1949). Nor do we contend the Norris-LaGuardia should be regarded as repealed or modified *pro tanto* by Section 301.

No such broad conclusions are required because the problem is essentially a very narrow one. If we concede that this is a "labor dispute", and that Section 301 has not repealed or modified the Norris-LaGuardia Act, the question still remains as to whether it prevents the issuance of the relief here sought. To answer this question, we have to examine the structure and provisions of the Act.

There are essentially two operative parts. The first, contained in Sections 3, 4, 5, and 6, sets forth certain specific kinds of injunctive relief which can never be given and certain specific grounds for relief which can never be urged. "Yellow dog" contracts cannot be enforced (Section 3); strikes, membership in a labor organization, the payment of strike benefits, peaceful picketing, and other enumerated acts can never be enjoined (Section 4); injunctions cannot be issued on the ground that a combination to do the acts enumerated in Section 4 constitutes a conspiracy (Section 5); unions cannot be held responsible for the acts of their members or agents without proof of authorization or ratification (Section 6).

The second portion of the Act (Sections 7, 8, 9, 10) is procedural. The earlier sections, and particularly Section 4, do not outlaw all injunctions against strikes or picketing or

other concerted activity. They protect, against injunctive relief, only "lawful" assistance to persons involved in labor disputes, picketing "not involving fraud or violence," and assemblies which are "peaceably" conducted. It could not be otherwise. The effort to prevent an anti-labor judiciary from using the injunctive weapon as a means of destroying unions and interfering with strikes could not go so far as to prevent the issuance of injunctive relief where there was fraud, violence or similar illegality and the threat of immediate damage was great. But, by providing exceptions to the absolute bar of Section 4 in such cases, a wide gap would be created through which that judiciary presumably could gallop unless procedural restraints were established to ensure that the illegality, fraud, or violence which would prevent the absolute bars of Section 4 from applying really existed.

And, so, in the succeeding sections we have a set of procedural requirements. Section 7 requires that there be specific findings that unlawful acts have been committed or threatened, that they will continue, that the injury will be substantial and irreparable, that there is no adequate remedy at law and, most significantly, that the public officers charged with the duty to protect the complainants' property are unwilling or unable to do so. It provides further that these findings be made after a hearing in open court, with opportunity for cross-examination and testimony in opposition, and it provides the most limited kind of authority for temporary restraining orders with provisions for security. Section 8 makes exhaustion of remedies to settle the dispute, including arbitration, a prerequisite of relief. Section 9 limits the extent of any injunction which may be issued upon the findings required by Section 7 to the specific acts complained of and included in the findings. Section 10 provides for immediate review.

The question here is whether these procedural requirements, and particularly the requirements of Section 7, ap-

ply in a case in which the relief sought is specific enforcement of an agreement to arbitrate. The language of Section 7 can conceivably be read to apply to such a case, since it says that no injunction shall be issued in a case growing out a labor dispute except upon the specified findings. But it can only be so read in isolation from the rest of the statute. If the statute is read as a whole, Section 7 is immediately seen to be a counterpart to Section 4. Section 4 forbids the federal courts to enjoin certain actions unless there is unlawfulness, fraud, or violence; Section 7 provides the procedure to be followed when it is claimed that these exceptions are involved.

This construction of Section 7 makes sense of its provisions and of the decisions in this Court which have held it to be inapplicable. In all of those cases the relief sought—recognition of a union, discontinuance of racial discrimination—was not of the kind which, absent allegations of illegality, fraud or violence, would have been prohibited by Section 4. Hence, the procedural requirements of Section 7 were simply inapplicable.

Any other construction would read Section 7 as setting forth procedural requirements which are nonsensical. It simply does not make sense to require that in order to obtain performance of the duty to bargain, as in the *Virginian Railway* case, to obtain relief from racial discrimination as in *Graham*, or to obtain performance of an agreement to arbitrate, as here, the plaintiffs should prove that police officers are unable or unwilling to provide protection for their property. Nor would it make sense to require an employer to offer such proof as a prerequisite to his obtaining similar relief against a union. The requirement makes sense where it was obviously intended to apply—to cases in which relief is sought which would be prohibited by Section 4 except for allegations of unlawfulness, fraud or violence.

What we urge, then, is not an *ad hoc* exemption from the

provisions of Section 7 for cases in which specific performance of an arbitration provision is requested, as stated by petitioners in the *General Electric* case, No. 276. We urge, rather, a reading of Section 7 which makes sense of the section in relation to the other sections of the Act, which is consistent with the prior decisions of this Court and of the Courts of Appeals, and which avoids the ludicrous result of using an Act which, in Section 8, expressly conditions the grant of equitable relief upon utilization of arbitration, where applicable, as a method of avoiding the use of arbitration.

IV—THE COMMON LAW RULE AGAINST SPECIFIC PERFORMANCE OF AN AGREEMENT TO ARBITRATE SHOULD NOT BE APPLIED HERE.

A—*Introduction*

In our argument so far we have deliberately attempted to isolate and dispose of the relatively simple issues and thus set the stage for examination of what has been the principal difficulty in this field. We have so far established, we believe, that the district court had jurisdiction over this suit, that it had power to grant appropriate equitable relief, and that nothing in the Norris-LaGuardia Act prevented it from granting that relief.

If these propositions are correct, it would follow that a union, in a suit in a Federal District Court, could obtain specific performance by an employer of his agreement with the union to, let us say, supply seniority lists or wage information, assuming that it could show, in accordance with traditional equity requirements, that such relief was proper. An employer similarly situated could obtain similar relief. To push our conclusions one step further, a union which claimed that an employer had refused to process grievances through the lower steps of a typical grievance procedure, providing for conferences with union officials and answers

within specific time limits, could maintain an action for specific performance of the agreement.

The question remains whether these conclusions are sufficient to supply the answer in the case in which the employer does process grievances but balks at the last step—arbitration. In this view, this final question is not one of establishing affirmatively that there is some law which authorizes the granting of specific performance of an agreement to arbitrate. It is, rather, a question of whether the common law rule as to the non-enforceability of agreements to arbitrate prevents the issuance of relief which could otherwise follow as a matter of course.

Before answering that question, however, it may be thought that we should enquire as to the basis upon which the answer is to be given. Is this question a question of substance or a question of procedure? If it is a question of substance, does state law or does federal law govern in a suit brought under Section 301(a)?

We do not propose to answer these questions in general terms. One of the difficulties which we believe may have led to the unfortunate disparity of opinion in the *Westinghouse* case was the attempt of counsel for the Union in that case to argue the abstract questions of whether Section 301(a) was procedural or substantive and whether state or federal law was to be applied in 301 actions. The question of what is substance and what is procedure, as this Court has itself noted, is a tricky one: The answer depends upon the purpose for which the question is asked, since there are no absolute categories which exist apart from the particular matrix in which the question occurs. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 (1945).

The same thing is true, we believe, in deciding whether state or federal law should govern in an action brought under Section 301. Here, too, we believe that there are no absolute categories. The answer to the question may, to be sure, phrased in abstract conceptual terms. But it rep-

resents merely a generalization from the specific kinds of questions which the person giving the answer has in mind.

The correct approach, we believe, is to decide each case as it comes along. This approach, we think, will solve most of the problems which so vexed some members of the court in the *Westinghouse* case. For we believe that in almost every case in which a question arises in a suit brought under Section 301, the determinants of the answer to be given, whether state or federal, will be clearly apparent from the nature of the particular question which is asked.

It is our position, therefore, that this court should decide only what it is asked to decide in this case, that is, whether in a suit brought under Section 301(a) the federal courts will specifically enforce an executory agreement to arbitrate. As to that particular question we have no hesitancy in urging that the question is a federal one and that it should be decided in accordance with federal law derived so as to give a cohesive consistency to the entire pattern of federal legislation with respect to labor relations. Whether this is called a question of substance or a question of procedure we think wholly immaterial. The important consideration, we urge, is that the federal statutes which govern the relationships between this union and this employer require the conclusion that the kind of relief which is being asked for in this case should be granted. What this imports for other cases in which other kinds of questions are presented seems to us to be best left to those other cases.

On this basis, then, we turn to examination of the claimed impediment to the granting of specific performance in this case—the common law doctrine that this remedy will not be granted if the agreement to be performed is an agreement to arbitrate.

The most frequently cited restatement of the common law doctrine is Mr. Justice Brandeis' opinion in *Red Cross*

Line v. *Atlantic Fruit Co.*, 264 U.S. 109. As stated by Mr. Justice Brandeis:

> "The Federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance or to stay proceedings on the original cause of action. They have not given effect to the executory agreement as a plea in bar, except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law or in equity. And, although there is no Federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process." 264 U.S. at 120-122(1924) (citations and footnotes omitted.)

Alabama law is apparently in accord, except that by statute executory agreements to arbitrate existing disputes may be enforced, although not agreements to arbitrate disputes which may arise in the future. See the cases cited in the opinions of Judge Jones (R. 46) and Judge Brown (R. 57).

We cannot, of course, argue that no such rule exists, although the Court below seems to have overlooked that the *Red Cross Line* case actually held that New York could con-

stitutionally change that rule with respect to admiralty cases heard in its own courts and that, in upholding New York's action, the Court noted that it had "no occasion to consider whether the unwillingness of the Federal Courts to give full effect to executory agreements for arbitration can be justified"[8] thus expressing at least inferentially the opinion that there was considerable doubt as to the propriety of continuing to abide by the rule.

Nor will we argue that the rule should be judicially reversed. It will be our purpose, rather, to argue that arbitration of the kind involved in all three of the cases now before the Court is simply not the same animal as that which the traditional rule governs. Its nature and its purposes are so different from the kind of arbitration which the Court discussed in *Red Cross Line* that, were it not for the unfortunate identity of names, there would not be the slightest doubt that the traditional rule is simply inapplicable.

B.—***The basis of the common-law rule of non-enforceability.***

Many arguments have been offered both in support and in condemnation of the common law rule against the specific enforceability of agreements to arbitrate. The most quoted condemnation was that of Lord Campbell in *Scott* v. *Avery*, 25 L.J. [N.S., Ex.] 308, 313, who ascribed the traditional rule to the fact that the pay of judges depended mainly, or almost entirely, upon fees and that the judges were opposed, for that reason, to anything that would deprive them of jurisdiction, and hence of compensation.[9] As Judge Hough said in 1915, "A more unworthy genesis cannot be imagined." *U.S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006, 1007.

On the other hand, supporters of the common law rule have argued that this was not in fact the genesis of the rule

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[8] 264 U.S. at 125

[9] Lord Campbell's opinion as reported in 5 H. L. Cases 811, 3 Eng. Rep. 1021, is much less explicit.

and that the objection was not to the use of "these peaceable and domestic tribunals," [10] but was simply a reluctance by the courts to hold parties to agreements which would have the effect of adjudicating their rights without protections provided in a court of law. As Mr. Justice Story said in a passage quoted by Judge Brandeis in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. at 121:

> "Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed further and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs."

There have been persuasive arguments on both sides of the question. See particularly the dissenting opinion in *Park Construction Co.* v. *Independent School District*, 209 Minn. 182, 296 NW 475 (1941). Remnants of the controversy still remain, even in the face of statutes explicitly reversing the common law rule. Where the courts believe, as this Court did in *Wilko* v. *Swan*, 346 U.S. 427 (1953) that there are special statutory protections for one party to a contract which may not be given full effect if the controversy is finally decided in a non-judicial forum they will not enforce the agreement to arbitrate.

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[10] 3 Blackstone, Commentaries, *15-17.

We do not propose to enter into the ancient controversy about the enforceability of agreements to arbitrate because we think that the controversy is wholly irrelevant. We refer to it briefly only to show that both sides of the controversy have held to one common and central assumption, an assumption which is correct with respect to the kind of arbitration they were discussing but which is simply not applicable to arbitration under a collective agreement. That assumption is that arbitration is a method of providing a "domestic forum," in Mr. Justice Story's words, as a substitute for the "common courts of justice." Whether the refusal to specifically enforce an agreement to arbitrate was a product of judicial jealousy or was an attempt to protect litigants from final adjudications in tribunals not providing the procedural protections afforded by the courts the common assumption was that arbitration was a substitute for litigation. In the words of the Second Circuit, "Arbitration is merely a form of trial . . . in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under the Federal Rules of Civil Procedure . . ." *Murray Oil Products Co.* v. *Mitsui and Co.*, 146 F. 2d 381, 383 (1944).[11]

Both the majority and the dissenting opinions in *Wilko* v.

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[11] That this was the basis upon which the common law rule rested is made particularly clear when it is recognized that, under the common law rule, an arbitration award once entered was enforceable substantially as if it were a judgment rendered by a judicial tribunal. As the Court of Appeals of New York said in 1854:

> "There is, or ought to be, no difference in the effect of an adjudication, as a bar to a subsequent suit, for the same cause, whether it is pronounced by judges selected by the parties or appointed by the State. In either case, every consideration of public policy requires that after the parties have been fully and fairly heard, further litigation as to the same subject matter should cease and no satisfactory reason can be assigned why a judgment, as an act by the law, should not estop the parties, and an award, which is another name for a judgment, which the parties have expressly stipulated should be final as to the subject submitted, should not be equally conclusive." *Brazil* v. *Isham*, 12 N.Y. 9.

Swan, 346 U.S. 427 (1953), exemplify this conception of the role of arbitration. In the words of Mr. Justice Reed, for the Court, at p. 438:

> "Congress [by the Arbitration Act] has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical, and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment."

Or, in the words of Mr. Justice Frankfurter, dissenting, arbitration has "the advantages of providing a speedier, more economical, and more effective enforcement of rights . . . than can be had by the tortuous course of litigation. 346 U.S. at 439-440. The difference between the opinions was a difference between the relative weight which should be given to statutory protection offered by the Securities and Exchange Act, on the one hand, and the Congressional recognition of the parties' voluntary designation of a non-judicial tribunal on the other. Both sides recognized that the agreement to arbitrate was an agreement to provide a substitute for litigation.

C.—***The inapplicability of the common law rule to arbitration under collective agreements.***

"One of the most treacherous tendencies in legal reasoning is the transfer of doctrines, which are, in effect, generalizations developed for one set of situations to seemingly analogous yet essentially very different situations." [12]

It should be plain that to apply the generalizations developed for the kind of arbitration discussed above to arbitration under collective agreements such as we have in these cases would be to follow just such a treacherous tendency. Arbitration in labor disputes is not the same thing as commercial arbitration. Its development was different, its pur-

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[12] Dissenting opinion of Mr. Justice Frankfurter in *Braniff Airways, Inc.* v. *Nebraska State Board,* 347 U.S. 590, 603 (1954).

poses are different, its forms are different, and its consequences are different.

Unlike commercial arbitration, which has its origins in antiquity,[13] labor arbitration is a modern phenomenon. Prior to 1900, "arbitration" in labor matters did not even necessarily involve the use of impartial third parties; the term included what is now called collective bargaining and was applied to all settlements of labor disputes by conference committees of the parties, whether or not outsiders were involved. It was in this all-inclusive sense that the National Labor Union in the 1860's and the Knights of Labor in the 1870's called for the arbitration of all labor disputes.[14]

Labor arbitration, in the sense in which we use the term today, had its beginnings shortly after the Civil War.[15] But there were few cases before the turn of the century. And only in the last twenty years has it become a familiar phenomenon.[16]

Most of the earliest labor arbitrations were what we would today call "contract arbitrations"—that is, they involved the question of what the terms and conditions of employment should be. Today, on the other hand, most

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[13] Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. of Pa. L. Rev. 132 (1934); Sayre, *Development of Commercial Arbitration Law*, 37 Yale L. J. 595 (1928).

[14] The National Labor Union at its convention of 1866 called for "the appointment . . . of an arbitration committee to whom shall be referred all matters of dispute between employers and employees." The preamble of the Knights' constitution called for "the substitution of arbitration for strikes, whenever and wherever employers and employees are willing to meet on equitable terms." 2 Commons, History of Labour in the United States (1918) 98, 336. The early history is summarized in Witte, Historical Survey of Labor Arbitration (U. of Pa. Labor Relations Series, 1952).

[15] Professor Witte dates the first American labor arbitration as April 19, 1871. Witte, *op. cit. supra* note 13, p. 11. Others give different dates. See Braden, *Arbitration and Arbitration Provisions* in N. Y. University, Second Annual Conference on Labor (1949) p. 355.

[16] Witte, *op. cit.*, p. 3.

labor arbitrations are "grievance arbitrations," the arbitration of disputed questions of interpretation and application of existing labor agreements. Although the two have much in common, and both are in a sense a part of the collective bargaining process which the earlier usage also called "arbitration," the distinction between "grievance arbitration" and contract arbitration" must clearly be kept in mind. Materials discussing "industrial arbitration" or "labor dispute arbitration," particularly if they are more than fifteen or twenty years old, usually refer to contract arbitration—the policy of settling differences as to what a collective agreement shall be by reference to a third party. They have little meaning with respect to the cases now before the Court, which involve grievance arbitration growing out of the more modern but today almost universal practice of establishing the terms and conditions of employment by a contract having a fixed term, with a provision for the settlement of disputes as to the interpretation and application of that agreement by arbitration.

Grievance arbitration has a resemblance to commercial arbitration in the sense that it arises out of an existing agreement, not a contract to make an agreement. But there is one significant difference which basically distinguishes it from commercial arbitration. Labor arbitration—whether contract or grievance arbitration—fulfills one vital function: the substitution of the judgment of a third party for the use of economic force. It is not a substitute for litigation. It is not a device by which the parties agree to accept a perhaps less precise adjudication of their legal rights in order to avoid the complications and expense of litigation. It is, rather, a device by which the parties agree to accept the judgment of a third party instead of fighting the issue out on the picket lines.

That this is the function of contract arbitration is, of course, clear. Such arbitrations are usually agreed upon an individual case basis to avoid or to settle particular

disputes and are especially familiar in public utilities or other industries seriously affecting the public interest.

Grievance arbitration is in this respect the same, although perhaps less clearly, as contract arbitration. Some labor agreements contain neither a no-strike clause nor an arbitration provision. Under these agreements disputes over its application and interpretation are settled either by negotiation or by a strike. Such agreements are today relatively infrequent. The Bureau of National Affairs reported a private survey in 1956 which showed that 91% of the agreements surveyed provided for arbitration of some kind and 89% contained some variety of no-strike clauses.[17] Sometimes, as in the *Westinghouse* case, arbitration of disputes over the application or interpretation of the agreement is provided for—but only if mutually agreed to in the particular case. Otherwise the union reserves the right to strike if the grievance is not settled through the grievance procedure.[18] In still other contracts, all disputes are made arbitrable except specific categories. Thus in the agreements in the automobile industry disputes over production standards and incentive rates are usually not arbitrable; but are specifically exempted from the no-strike clause.[19] Finally, in many agreements, such as those in the basic steel industry, there is an unconditional no-strike clause and an agreement that all unresolved disputes as to the interpretation and application of the agreement shall be settled by arbitration.[20]

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[17] Collective Bargaining Negotiations and Contracts (hereinafter cited as CBNC) 51:7, 77:1.

[18] Record, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, No. 51, October Term, 1954, pp. 32, 35.

[19] CBNC 77: 103.

[20] In 1952 the public members of the Wage Stabilization Board recommended, as a solution to the inability of United States Steel and the United Steelworkers of America to agree on the standards to be used to test the fairness of new incentive plans, that in such

Whatever the formula in the individual labor agreement, the same pattern appears. The agreement to arbitrate grievances is the concomitant of the agreement not to strike; the arbitration process is the substitute for the strike and the picket line in settling questions of application of the agreement.[21] It differs from contract arbitration in that it is the parties' method of implementing their desire to keep the agreement in force during its term, rather than a method of making an agreement. It is similar in the sense that in both cases the alternative is a strike.

Conceptions of the manner in which grievance arbitration should be conducted vary. Some of the most learned practitioners in the field believe that the grievance arbitration process is essentially an extension of collective bargaining. Those who hold to this view emphasize the necessity of mutual acceptability of the arbitrator's decisions and reiterate that, unlike parties to a commercial contract, the parties to a collective agreement must continue to live with

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disputes the no-strike clause be waived. *Basic Steel Industry,* 18 LA 112, 130 (1952). The suggestion was not adopted and the agreement now provides that the arbitrator shall decide whether a new incentive provides "equitable incentive compensation." cf. CBNC, 93:454.

[21] We do not mean to say that there is a complete correspondence between the agreement not to strike and the agreement to arbitrate on every point in every labor agreement. Sometimes an agreement provides that "casual corrections and necessary routine changes" are not subject to the grievance and arbitration procedure. See CBNC 51:12. Such an agreement means in essence that the employer's action with respect to such matters is not to be regarded as limited by the agreement. In other cases, as in the present agreement, it is specifically provided that "general wage revisions" are not subject to arbitration (R. 17). See also CBNC 51:264. This simply expresses the parties' agreement that the general wage scale established by the agreement shall remain in effect during its term and prevents any contention that the agreement to arbitrate is to be construed as "contract arbitration" going beyond the settlement of grievances as to the meaning and application of the terms of the agreement.

each other and to operate together after the decision in an arbitration case has been made.[22]

There are those, on the other hand, who regard grievance arbitration as a much more judicial process in which the arbitrator is bound to follow the meaning of the contract between the parties without regard to its effect upon their future relationships and without much regard to the factor of mutual acceptability.[23]

This controversy, however, does not at all impinge upon the conclusion, with which all concur, that grievance arbitration is not a substitute for litigation but is, rather, a substitute for the settlement of disputes by the use of economic force. Indeed it emphasizes its truth. Those who adhere to the more judicial view of the arbitration process believe that a union, having made a contract, should be bound to live by that contract without interpolation or amendment by the arbitrator, for its term. Those who take the more flexible view of the arbitration process believe that in deciding what the application of that agreement should be to situations not envisaged by the parties more attention should be paid to their needs than to the literal wording of the agreement. But both accept as a fundamental characteristic of the grievance arbitration process that, unlike commercial arbitration, it is the agreed-upon substitute for economic conflict in the determination of the

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[22] The most prominent spokesman for this point of view has been Dr. George W. Taylor. See Taylor, *The Voluntary Arbitration of Labor Disputes,* in The Law and Labor-Management Relations (U. of Michigan, 1951). See also Simkin, *Acceptability as a Factor in Arbitration Under an Existing Agreement* (U. of Pennsylvania, 1952).

[23] See the comments on Doctor Taylor's paper in *The Law and Labor-Management Relations,* cited *supra* note 22 by Owen Fairweather at pp. 207, and also Fairweather and Shaw, *Mimimizing Disputes in Labor Contract Negotiations,* 12 Law and Contemporary Problems (1947) pp. 297, 316-317; Braden, *Arbitration and Arbitration Provisions,* cited *supra* note 15, p. 361.

method of handling particular situations which arise during the term of the collective agreement.

Even the American Arbitration Association which has been the leading organizational advicate of the so-called judicial approach to grievance arbitration has recognized that it is so different from commercial arbitration that different procedures and different standards must govern the two kinds of proceedings.[24]

As Jesse Friedin put it in summarizing the relationship between grievance arbitration and the courts:

> "It is of first importance that in dealing with arbitraton, whether legislatively or judicially, it should be recognized that this is not litigation in the conventional sense. Nor is it a substitute for litigation. It is a procedure specially designed to meet the need for a substitute for strike . . . . If this essential nature of labor arbitration is as deeply felt by lawmakers and judges as it is by the men who daily deal with grievances and the making of collective agreements, we shall have gone far toward clarifying the confusion between commercial and labor arbitration. The former may truly be considered a substitute for litigation and an intrusion upon the historic jurisdiction of courts. And justification there may be for more intense supervision of commercial awards. But the stuff and history of labor arbitration is wholly different.[25]

Every other informed student of the field agrees.[26]

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[24] American Arbitration Association: *Commercial Arbitration Rules*; American Arbitration Association, *Labor Arbitration Rules*. See Kellor, *American Arbitration*, (1948) pp. 83 ff.

[25] *Labor Arbitration and the Courts* (1952) p. 47.

[26] Dr. George W. Taylor: ". . . . arbitration, like the strike for which it is a substitute." *op. cit. supra* note 22 at p. 197; Simkin, *op. cit. supra* note 22; Lapp, *Labor Arbitration* (National Foreman's Institute 1942) pp. 4, 8, 9; Braden, *Arbitration and Arbitration Provisions*, cited *supra* note 15, p. 375; Fairweather and Shaw, *op. cit. supra* note 23, at p. 318.

Fortunately in the present case the collective agreement makes explicit what is sometimes merely implicit in labor agreements: the necessary connection between the agreement to arbitrate grievances and the agreement that there shall be no strikes. Both questions are dealt with in the same article, which is entitled: "Strikes and Lockouts—Arbitration." (R. 15) The Article begins by stating that the employer and the union agree that the procedures provided in the article are adequate to provide a fair and final determination of all grievances and that therefore they both agree that strikes and work stoppages should be avoided. This is further implemented by the specific grant of authority to the employer to discharge employees who engage in work stoppages or slowdowns during the term of the agreement "as a result of the failure of an employee to exhaust all grievance procedures available under the contract." And Union action to prevent and secure the termination of strikes is specified in cases in which they occur over grievances which are "arbitrable under the contract."

The nature of the agreement to arbitrate in a labor contract as a substitute for the right to strike, rather than as a substitute for litigation, is further emphasized by the nature of the grievances here sought to be arbitrated. These are not grievances which would normally be settled by resort to a court of law. They involve the question of whether the Company was justified in increasing work loads and reducing the number of employees assigned to complete given tasks. The parties agreed that this kind of question should be determined on the "basis of sound engineering principles and practices" and that the rate to be paid for the

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That grievance arbitration is something more than a substitute for the right to strike and is, or should be, an integral and continuing part of a system of industrial self-government, as Harry Shulman correctly argued (Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955)) does not detract from but adds to the conclusion that it is something very different from commercial arbitration.

work shall be "based on the full use of an employee's time during his work day, working at the normal pace of an average qualified employee with adequate allowance for fatigue and personal needs." (R. 11)[27] They further agreed that in any arbitration on such question the arbitrators shall be a "qualified textile technicians" or other similarly qualified persons.

This is grievance arbitration, to be sure. But the standards are extremely general in nature. Necessarily so. No labor agreement can specify in details what each employees work load shall be. Nor will employers generally willingly agree, and understandably, to specify simply that there shall be no changes in work loads during the term of the agreement. Equally, no union which does not abandon its function of protecting its members can agree to permit unilateral changes in work loads during the term of an agreement without some form of control. Two avenues of limitation are possible: 1) the right to strike to protest against changes in work loads (as in the automobile industry) or 2) an agreement to arbitrate under general principles of equity and fairness.

The parties here chose the second route. It simply does not make sense to treat that expression of choice as equivalent to the traditional agreement to arbitrate questions of damages or performance or non-performance of a commercial contract. Nor should the judicial determination of the remedy to be afforded when one party or the other fails to perform such an agreement be regarded as governed by the self-imposed limitations developed by the courts with respect to commercial arbitration agreements. The two are just different.

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[27] The text of paragraphs A and B of Article V was unfortunately garbled in the printing of the record. We attach, as Appendix B to this brief, the correct text, as it appeared in the printed collective agreement annexed as Exhibit A to the complaint in the District Court.

It is permissible to argue, although not in this forum, that collective agreements are so different from commercial contracts that legal enforceability by actions in the courts is undesirable, on whichever side the breach may occur. See Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1955). Much of the American labor movement has traditionally taken that view and we are inclined to agree with it.[28] But Congress has settled that argument, at least for the present, by the Taft-Hartley Act, and particularly by Section 301 (a). To that section we now turn.

V—SECTION 301 (a) IS A SUFFICIENT BASIS UPON WHICH TO HOLD THAT A FEDERAL DISTRICT COURT CAN SPECIFICALLY ENFORCE THE AGREEMENT TO ARBITRATE.

What has been said above leads to two possible conclusions. On the one hand, we have urged in Parts I-III above that the District Court had jurisdiction over the case, that it had the power to grant equitable relief if appropriate and that nothing in the Norris-La Guardia Act prevented it from exercising that power. If it is also true, as we argued in Part IV, that the common law rule against the specific enforcement of executory agreements to arbitrate is not properly applicable to collective agreements, then there is no bar to the relief requested here. The Federal courts by virtue of their inherent powers as courts of equity can give that relief, as they would with respect to any other agreement in a case over which they have jurisdiction.

This was the view of Judge Brown, dissenting, in the court below. We need not repeat here his persuasive arguments in support of that view. Certainly if recourse is had to the whole complex of Federal labor legislation to establish the climate in which the federal courts are to exercise

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[28] See Hearings Before the Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess., Part 1, p. 478 (1949).

their jurisdiction, this result seems to be required. Section 201 of the Labor Management Relations Act, 1947, states it to be the policy of the United States that "sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation . . . . can most satisfactorily be secured" by the settlement of issues through collective bargaining and that, to that end voluntary arbitratoin should be encouraged "to reach and maintain" collective agreements, "by such methods as may be provided for in any applicable agreement for the settlement of disputes." The Federal Mediation and Conciliation Service which is established by the Act, is specifically directed to assist parties to that end. 29 U.S.C. § 171. Section 203(d) of the Act establishes as the desirable method for settlement of grievance disputes under existing collective bargaining agreements the method agreed upon by the parties in such agreements. 29 U.S.C. § 173(d). And to these evidences of congressional policy must be added the earlier provisions of Section 8 of the Norris-La Guardia Act which makes the issuance of injunctive relief in labor dispute cases dependent upon the exhaustion of applicable arbitration procedures.

Judge Brown's view, however, does not give full weight to the considerations which we set forth in Part IV above. If we are correct that arbitration under collective agreements is a substitute for the strike, rather than for litigation, we have established more than the inapplicability of the common law rule against specific enforcement of such agreements. We have also established affirmatively a basis upon which a Federal Court should enforce the promise to arbitrate in a suit brought under Section 301(a). For, if we are correct, arbitration is not merely a matter of procedure, an alternative method of establishing legal rights which could be pressed in litigation in the absence of such an agreement. To the contrary, the agreement to arbitrate goes to the whole substance of the collective agreement. Particularly is this so in this case, where the dispute centers

on work loads and the contractual principles which govern the arbitration consist only of a restatement of the broadest of general principles. The agreement to arbitrate is, in essence, an agreement to abide by, as if written into the contract, rules for specific cases as determined by the arbitrator.

Arbitration, in this sense, is not only not a substitute for a litigation: the agreement to arbitrate is the consideration for and part and parcel of the agreement not to strike.

If this is so, Section 301(a) has particular significance. The section, it is true, is phrased simply as a jurisdictional provision. And it is also true that nothing in its legislative history indicates that Congress at any time focused on the problem of enforcement of agreements to arbitrate.

But Congress did focus upon the agreement not to strike. Indeed there can be little doubt that the sponsors of the legislation had particularly in mind one specific case: a breach by a union of an agreement not to strike during the term of a collective bargaining agreement.

As the Senate Committee put it:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
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> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S. Rep. No. 105 on S. 1126, 80th

Cong., 1st Sess., p. 16. See also H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 297, 337.

The problem in this case, as Congress saw it, was that unions, as unincorporated associations, could not be reached by suits in most state courts. It was necessary, therefore, to provide that unions could be sued as entities in the Federal courts. This was the omission from the Case bill as it passed the House in the 79th Congress which, as Mr. Justice Frankfurter's opinion in the *Westinghouse* case points out, Senator Taft had found objectionable.[29] This was done in Section 301(b).

But it was also necessary to establish a Federal cause of action so that this procedural rule could be applied. As the Senate Committee report noted, after discussing the procedural difficulty,

> "There are no Federal laws giving either an employer or even the Government itself any right of action against a union for any breach of contract. Thus there is no 'substantive right' to enforce, in order to make the union suable as such in Federal courts." *Op. cit.*, p. 17.

It was to meet this objective—which had been encompassed by the Case bill—that Section 301(a) was contained in the bill.

If we concede, as we must, that the principal target which the sponsors of Sections 301(a) and 301(b) thought their double-barrelled shotgun would reach would be unions which breached their no-strike agreements, we do *not* concede that Congress intended to pass a statute allowing only suits against unions. To the contrary, we think it is clear that no such legislation could have passed even the 80th Congress, and we doubt that Senator Taft himself would have sponsored any such proposal.

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[29] See the history referred to by Mr. Justice Frankfurter, 348 U.S. at 445-446.

Senator Taft and the other sponsors of Section 301 did believe that unions were the chief if not the only non-performers of promises in collective agreements. Unions were the villains whom they thought would be the defendants if the Federal courts were given jurisdiction over breaches of such agreements. But no one proposed, and Congress did not enact, a statute giving relief only against unions for breach of a no strike-arbitration provision. To the contrary, all of the argument in favor of the enactment of Section 301 was explicitly premised on the objective of making, as the Senate Committee put it, "collective-bargaining contracts equally binding and enforceable on both parties." [30] Or, as the House Committee said, the section would make both parties "equally responsible . . . for contract violations and provides for suit by either in the United States District Courts." [31]

The objective was clearly stated in the Senate Committee report:

> "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."

If this was the Congressional purpose, then the answer to the question in this case must immediately be clear. Without arguing whether, *in general,* Section 301(a) is substantive or procedural or whether, *in general,* Federal or State law is applicable to such agreements, one particular conclusion is inevitable: the agreement to arbitrate which is the indispensable *quid pro quo* for the agreement not to strike must be enforceable in the Federal courts in a Section 301 suit. To come to any other conclusion would be to convert the equality of responsibility which Congress said it was

[30] S. Rep. No. 105, 80th Cong., 1st Sess., p. 15.
[31] H. Rep. No. 245, 80th Cong., 1st Sess., p. 6.

providing for in Section 301(a) into a snare and a delusion. To hold that an employer can recover damages in the Federal courts if a union violates its promise not to strike but that the union cannot compel performance of the method of enforcing the standards provided in the collective agreement which the union has accepted in lieu of the right to strike would be to convert an instrument which Congress said was designed to promote industrial peace into an instrument of unilateral industrial warfare.

Section 301(a) must be read, therefore, in the light of its legislative history and objectives, as having been designed to prevent strikes and to promote industrial peace by making enforceable in the Federal Courts the reciprocal promises of both unions and employer that there shall be no strikes but that all disputes as to the meaning and application of their agreement shall be resolved through the grievance and arbitration procedure.

The fact that Congress did not advert to the enforcement of agreements to arbitrate is immaterial. Congress did not in fact advert to *any* specific case in which an employer refused to perform a collective agreement. Looking only at the instances in which unions violated such agreements, Congress said that *both* parties should be able to sue. Looking only at instances in which unions violated the reciprocal no-strike-arbitration provisions, Congress said that *both* parties should have a remedy. The legislative history, under such circumstances, necessarily does not show specific consideration of what the courts should do when unions availed themselves of the statutory grant. But the courts, in enforcing the counterbalance which Congress provided in general terms without discussion of any specific application, can and should provide the counter-balancing remedy necessary to make collective agreements, as the Senate Committee said, "valid, binding and enforceable."

Nor is it material that both the Senate and the House, focusing again only on union failure to abide by the agree-

ment to arbitrate and not strike, considered providing enforcement mechanism through unfair labor proceedings before the National Labor Relations Board [32] but eventually decided to leave such enforcement "to the usual processes of law." [33] The choice here was a choice of forum not a choice of remedy. The National Labor Relations Board was regarded as the appropriate instrument to enforce the duty to bargain collectively, the courts the appropriate instrument to enforce the collective agreements bargained for.

In this case, the Company increased work loads and reduced employees in April and May of 1954. The union did not call a strike and the employees continued to work, in compliance with the collective agreement, for a four-week trial period. They then filed grievances. The Union sought the decision, for which it had bargained in return for the no-strike clause, as to whether or not the Company's changes were proper. Section 301(a) should be read, we believe, as authorizing the Federal courts to grant them that relief.

VI—THERE ARE NO SERIOUS PRACTICAL OBJECTIONS TO RELIANCE ON SECTION 301(a) ALONE AS AUTHORIZING SPECIFIC PERFORMANCE.

In the *General Electric* case, the First Circuit, by Judge Magruder, said that the history of the "hoary though probably mis-guided judge-made reluctance to give full effect to arbitration agreements" convinced it that specific performance of such agreements could not be granted without an explicit statutory basis. That history, as we have argued above, was concerned with arbitration as a substitute for

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[32] H. Rep. No. 245 on H.R. 3020; 80th Cong., 1st Sess., pp. 19-21 (1947); S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 20, 23 (1947).

[33] H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 42 (1947).

litigation, not grievance arbitration, and hence should not be regarded as binding.

In addition, Judge Magruder said, "practical grounds support this conclusion." Those practical grounds he listed as the absence of the procedural safeguards and specifications contained in a typical arbitration statute. And those same grounds, he found, militated against reliance on Section 301(a) as the basis for enforcing the agreement to arbitrate.

The answer to these practical objections is the same as the answer to reliance on the hoary judicial precedents—they may make sense as applied to commercial arbitration but not as applied to grievance arbitration.

Some problems are, of course, the same. Thus the failure of the parties to specify an arbitrator needs to be remedied whatever kind of arbitration be involved. But this is not a difficult problem. There is no more need for specific statutory authority to appoint an arbitrator, where the parties are unable to agree, than there is for specific statutory authority to name a substitute trustee or successor trustee in ordinary equity practice. Furthermore, the problem is a rare one, since labor agreements commonly specify, as the agreement in this case does, a method for selection of an arbitrator, through the American Arbitration Association or the Federal Mediation and Conciliation Service,[34] if the parties cannot agree.

Most of the other provisions in a typical arbitration statute are responsive to a problem not present in grievance arbitrations: the necessity of specifying procedures which will give the arbitrators' award the force of that for which it is to be substituted—the judgment of a court of law. Thus a typical arbitration statute provides for a summary pro-

[34] The Arbitration Association, which more closely analogizes labor cases to commercial cases, since it handles both but under different procedures, will not appoint an arbitrator where one party refuses to participate in the selection process. The Federal Mediation and Conciliation Service will. See its Second Annual Report (1949) p. 38.

cedure, by motion, for confirmation of an award. It provides for modification or correction of the award, again by motion, where there is "an evident material miscalculation of figures." It provides for vacation of the award by motion if it is not "final and definite," or if the arbitrator refused to hear "pertinent and material evidence," and it provides that an order entered on an award shall have the same effect as a judgement in an action.

Procedurally such statutes provide for subpoenas and witness fees, and—in the United States Arbitration Act—for libel and seizure of a vessel by a District Court, if the arbitration involves a matter justiciable in admiralty, as a basis for beginning the arbitration.

All of the procedural specifications are necessary if arbitration is regarded as a substitute for litigation. They, in effect, treat the arbitration process as having the same stature and therefore being subject to the same procedural limitations and requirements as a proceeding in court. They are completely foreign to the course of grievance arbitration. And they are unnecessary because what the parties want in a grievance arbitration, and the reason they provide for arbitration, is not the procurement of a judgment at law as to the liability of one party or the other to pay damages for breach of a contract to buy or sell goods, or to charter a vessel. What they want is a determination of the meaning of the general standards they have provided for in the collective agreement as they apply to the particular case. Is the work load assigned to a particular job too high? Does a particular incentive yield equitable compensation? Was a discharge for just cause? What they get is not primarily a judgment for damages—although sometimes back pay or damages may follow as an incident to the determination they seek—but a specification of the meaning of their continuing agreement as it applies to a particular case. The procedural requirements of a typical arbitration statute are largely irrelevant for this kind of a proceeding. In some

cases they provide a useful analogy, as Judge Wyzanski held in *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953). But their absence creates no practical problems which should bar a simple injunctive order directing the parties to proceed as they have agreed to proceed.

VII—THE CONSTITUTIONAL AND FORUM-SHOPPING PROBLEMS ARE NO GREATER HERE THAN WHEN A UNION IS SUED FOR BREACH OF A NO-STRIKE ARBITRATION PROVISION.

No party in any of the three cases now before this Court dealing with the enforcement of agreements to arbitrate grievances has suggested, as far as we know, that any constitutional problem exists. In view of the *Westinghouse* case, however, it may not be wise to omit discussion of this question, although in our view the discussion need not be extensive.

We wish to assert only two propositions. First, we think that the logical consequence of our view of the grievance arbitration process and the application of Section 301(a) to it is that no possible constitutional problem exists. Congress had said, as a substantive matter, that both unions and employers are obliged to bargain in good faith with each other with respect to a no-strike - arbitration clause. It has established, as the federal labor policy, that such agreements when entered into should be performed in order to preserve industrial peace. And, to that end, it has authorized the bringing of suits for breach of such agreements in the Federal courts.[35] We think that there would be little constitutional question if Congress had specifically said: where an agreement affecting commerce provides that there

[35] ". . . to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1947), p. 16.

shall be no strikes but all disputes arising during its term as to its meaning and application shall be settled through the grievance and arbitration procedure specified in the agreement, the Federal District Courts shall have jurisdiction to direct specific performance of the agreement to arbitrate and to award damages to any employer who may suffer loss because of violation of such provision. In our view this is the effect of the statute which Congress did pass as it applies here. Hence, we see no constitutional problem.

Our second proposition is that there can be no constitutional question here which is any more serious than would be presented in a case in which an employer sued for damages for breach of a no-strike - arbitration clause. In such a suit there could be no question of statutory construction, since Congress specifically adverted to this example of the intended operation of Section 301(a). The constitutional issue, if there is one, would therefore have to be decided one way or the other.

It happens, however, that suits by unions are the first to be heard by this Court under Section 301(a). The application of the statute in such cases is less clear because Congress did not advert to any specific examples of the intended operation of its authorization for suits by unions. If the Court should use this uncertainty to whittle away at the right of unions to sue, in order to avoid a constitutional question and then in an employer suit hold the statute constitutional, the effect will be to make the meaning of the statute depend upon the accidental sequence of litigation. In order to avoid a constitutional question which, in the end, will have to be met, the Court will have distorted the expressed intention of Congress to balance the rights of employers and unions.

Section 301(a) has been, of course, applied against unions. A recent example is *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F. 2d 576 (1st Cir., 1956), in which a judgment of $359,000 was affirmed by

the First Circuit over a constitutional objection by the union. A petition for certiorari was filed. No. 176, October Term, 1956. The case was settled, however, and the petition dismissed pursuant to stipulation. If the *Mead* case had been decided by this Court there could be no constitutional problem here—the statute is either constitutional both ways or unconstitutional both ways. Constitutional doubts which would exist equally in the *Mead* case and in this case should not be used to construe away union remedies here because the *Mead* case was settled.

The same considerations apply to the forum-shopping considerations and federal-state problems mentioned in Justice Frankfurter's opinion in the *Westinghouse* case. All are equally applicable to suits which Congress clearly intended employers to be able to bring in the Federal courts. These considerations may argue, and persuasively, against the enactment of Section 301(a). Indeed the minority reports in both Senate and House set them forth quite clearly.[36] But Section 301(a) was enacted nevertheless. If there is to be shopping, the market should be open—as Congress said it should be open—to both employers and unions.

VIII—IF OUR ARGUMENT AGAINST APPLICATION OF THE COMMON LAW RULE IS INCORRECT, THEN THE UNITED STATES ARBITRATION ACT SHOULD BE HELD TO APPLY IN ACCORDANCE WITH THE OPINION OF THE FIRST CIRCUIT.

The burden of our argument so far has been that grievance arbitration of the kind here involved is so different from the commercial arbitration dealt with by the common law precedents that the District Court was free, even without

[36] House (Minority) Report No. 245 on H. R. 3020, 80th Cong., 1st Sess. (1947) pp. 109-110; S. Rep. No. 105, Part 2 (Minority Views), on S. 1126, 80th Cong., 1st Sess. (1947), p. 14.

explicit statutory provision, to grant the relief requested. We have further argued that if any fair meaning is to be given to Section 301(a) it must be construed as permitting the Federal Courts to protect both the employer and and the union interests in the reciprocal no-strike - arbitration provisions of a collective agreement. The employer's interest is protected by a suit to recover the financial damages which he may suffer as a result of a violation of such a provision; the union's interest can only be protected by specific performance of the agreement to arbitrate.

The necessary premise of this argument has been the distinction between commercial arbitration and grievance arbitration. If we are wrong that this distinction supplies the method for enforcing the equal responsibilities which Congress said it intended to enforce by virtue of Section 301(a), then it follows, for the same basic reason, that the United States Arbitration Act, in conjunction with Section 301(a), should be construed as authorizing the relief here sought.

That Act was intended to abolish in the Federal courts the common law rule against the enforcement of agreements to arbitrate. We have argued that the common law rule was only properly applicable to commercial arbitration and should not be applied to grievance arbitration. If we are wrong on that, then clearly the statute abolishing the common law must be read as applying to grievance arbitration as well as commercial arbitration. Any other result would leave grievance arbitration, which was unknown at common law and to which the rationale of the common law rule is plainly inapplicable, the only surviving victim of a rule which no longer exists in the area of its proper applicability. This result, furthermore, would come about at a time when Congress has expressed its view in Section 301 of the Taft-Hartley Act that collective agreements should be treated, like commercial contracts, as legally enforceable obligations.

Such an incongruous result could of course be justified if there were unmistakeable evidence that Congress clearly intended it. But such evidence does not exist.

Since we believe, as must be obvious from the earlier portion of our argument, that the proper method of avoiding this unintended incongruity is to consider grievance arbitration wholly apart from commercial arbitration, we will not offer extended argument on the United States Arbitration Act, except as we think we can add to the treatment contained in Judge Magruder's opinion in the *General Electric case,* No. 276. We also respectfully refer the court to the thoughtful and persuasive treatment of the subject by Professor Archibald Cox in *Grievance Arbitration in the Federal Courts,* 67 Harv. L. Rev. 591 (1954).

A—Grievance arbitration was virtually unknown at the time the Arbitration Act was passed.

Before examining the particular portions of the Arbitration Act which seem to provide the greatest difficulty, we think one point is sufficiently important to deserve special emphasis. That point is that the process of applying the Arbitration Act is a process of fitting it to a phenomenon that was virtually unknown in 1925.

As we have already noted in Part IV, *supra,* "it was only in the nineteen-thirties that labor arbitration predominantly came to mean arbitration in grievance cases." [37] Prior to that time the principal form of labor arbitration was the settlement of labor disputes, in the sense of disputes as to what the terms of the wage bargain should be. The terms "labor arbitration" or "industrial arbitration" were used primarily to describe that kind of device. Grievance arbitration did develop out of the use of arbitration as a method of fixing piece rates in the clothing industries after the Protocol of Peace of 1910, but even there it was not until much later that this process became the interpretation and application

[37] Witte, Historical Survey of Labor Arbitration (1952) p. 49.

of agreed-upon standards contained in a contract rather than a method of settling a wage controversy. [38]

In dealing with the Arbitration Act, then, we cannot look to see whether Congress intended to cover or exclude grievance arbitration as we know it today. It could not have intended either. The question is whether the language which Congress wrote should be construed in the light of today's conditions and today's Congressional policy as including or excluding this new development.

B—*A collective agreement is not a contract of employment.*

Section 1 of the U. S. Arbitration Act exempts from its provisions "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." A collective agreement is plainly not a contract of employment. See *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-35 (1944). From the fact that the exclusion of contracts of employment was apparently inserted to overcome objections to the Arbitration Act by the International Seamen's Union of America, however, it has sometimes been assumed that the words "contract of employment" must have been used, perhaps inartistically, to refer to a collective agreement.

Such a conclusion overlooks the fact that seamen are peculiarly one of the few classes of workers that do actually sign individual contracts of employment: the traditional shipping articles which must be signed by every seaman. And, typically, at least in the early 20's, such individually signed contracts provided as follows:

> "It is further understood and agreed that any question whatsoever between Master, Consignee, Agent or Owner of the above named vessel, and any of the undersigned seamen or mariners shall be heard and de-

[38] *Id.* at 28-29, 48-49.

> cided by any Shipping Commissioner or Consul appointed under the authority of the laws of the United States, and that every award so made by him shall be binding upon parties, and shall in any legal proceeding which may be taken in the matter before any Court of Justice be deemed conclusive as to the rights of the parties as to such question or subject of dispute." [39]

In commenting on the clauses commonly being inserted in 1921 in shipping articles President Furuseth of the Seamen's Union found such arbitration provisions particularly objectionable:

> "The one provision found in nearly all of these insertions to the effect that the Shipping Commissioner shall act as arbitrator of any or all disputes and that such decision as he may make shall be final is intended to deprive the seaman of the right to appeal to the Courts. The Shipping Commissioners Act gives no such power to the Commissioner, unless there is a submission in writing and such submission is made after the dispute has arisen and not prior to entering into the agreement. It has no right in the articles. I have discussed this clause with the Commissioner of Navigation and he admitted that it is not strictly according to law; but if the men are not willing to sign such clause they need not. This is nothing short of inviting the men to strike to get the law enforced. If the seaman does this all the blame is heaped on him." [40]

With this background it is understandable that when, at about the same time, it was proposed to make agreements to arbitrate future disputes enforceable, the Seamen's Union should be concerned about the effect of such legislation on these individual contracts of employment.

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[39] Proceedings, Twenty-Fourth Annual Convention of the International Seamen's Union of America (1921) pp. 27-28.

[40] *Id.* at 28-29.

The union did oppose the legislation as it was originally drafted. At its 1923 convention it adopted a resolution dealing with the question. It was entitled "Compulsory Labor" and it said in part:

> "To use the necessities of men as in H.R. 13522, whether such necessities be individual or arising out of family relations, is especially reprehensible because it makes need, hunger and want, the basis of contracts which the American sovereign may legally be able to make, and which a misused equity power will enforce but which is an abdication of such sovereignty for the purpose of obtaining bread for self or family and further be it
>
> "Resolved, That we condemn any policy be it of a State or National scope, the purpose of which is to create bondage in any form or for any purpose, except as a punishment for crime." [41]

If this sounds like a strange analysis of an arbitration statute, it must be remembered that by signing shipping articles the individual seaman bound himself to serve on the voyage described in the articles. And if the agreements to arbitrate in such articles were made enforceable it was believed that the result would be a decision by a ship commissioner or consul having the force of law compelling the individual seaman to continue to serve. President Furseth explained it to the union's convention in these words:

> "You know that there is not a set of articles signed that has not in it some kind of rider, as I call it, something about this, that, or the other thing. I collected them together as near as I could and put them into the proceedings at the Philadelphia Convention and referred to them again at other Conventions. Now

[41] Proceedings, Twenty-Sixth Annual Convention, International Seamen's Union of America (1923) p. 84.

some of those riders are not prohibited plainly by law. There is nothing in the law that deals with it, but it goes to the very roc' of things all the same and the men are signing those riders right and left. I cannot pick up a set of articles anywhere but there is some such rider on it. And then there is usually at the end of the article, or somewhere in the article, a provision that any dispute arising shall be referred to the shipping commissioner and settled by him.

"Now the Shipping Commissioner Act says that after this disagreement has arisen and it is referred to him by the parties in question in a written statement, for a decision, then his decision is final. Now then the lawyers go a little further and they say, 'Well, if that can be done prior to the signing of the articles or at the signing of the articles and before the discrimination arises, why not refer it to the shipping commissioners completely?' Now the courts in several cases I think decided against certain riders as being extra legal or not legal at all. The ship owners took the case to the court of appeals, and the Union having money at the time the case came to my attention, I said to appeal it.

"Now the consuls find this thing in the articles, the average ship commissioner finds it in the articles and they without any hesitation say, 'Well, you signed this kind of thing and you stay by it,' and you have no remedy in the case of consul because you have no court to go to. In the case of shipping commissioners you have a remedy if you have the necessary money to get a lawyer and take it to the court, but if this bill is passed and this system adopted you could not get to the court at all. You will go nowhere except to the shipping commissioner and in the foreign countries to the consul. And that is all there is to it. You

cannot get anywhere because the road is blocked by legislation."[42]

As President Furseth's analysis, printed as an appendix to the convention's proceedings, put it:

"Thus it seems certain that this bill provides for re-introduction of forced or involuntary labor, if the free-man through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the sea-man, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in 'Interstate and Foreign Commerce.'

"With reference to the seaman it will be an easy matter. Place in *the contract to labor—the shipping articles*—any rider not specifically prohibited by law, and the articles are loaded down with such already, and then at the end of the articles a rider already rather usual, that any disagreement shall be arbitrated by the Shipping Commissioner (under existing statutes this includes consuls), and the seaman's right to wages, to food, to damages under the Jones Act, *together with his present right to quit work in harbor,* becomes void. With the seaman the machinery is there and ready. The shipowner only needs this bill to become law and slavery is restored without any other noise, except such as the victim may make."[43] (Emphasis added.)

Unions, he believed, would not help. If they entered into arbitration agreements, they would be bound and it

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[42] *Id.* at 68.

[43] *Id.* at 203-204.

could then be argued that, through the organization, the individual members would be held to the same kind of involuntary servitude.[44]

The answer to all of this, of course, would be to make it plain that the Act would not be applied, either directly or indirectly, to the individual contracts of employment. And this is precisely what the Act, as finally drafted and passed in 1925, did.

To argue that this exclusion was intended to apply to grievance arbitration in collective agreements would imply extraordinary prescience to Congress. Grievance arbitration was just being born at the time. What Congress meant to exclude by the term "contracts of employment" was precisely what it said—the contracts by which individuals are employed.

C—*The agreement here does not involve "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."*

If, despite the real nature of the union objection to the Arbitration Act recited above, the Court should find that the exemption of contracts of employment contained in Section 1 of the Act was intended to exempt all labor arbitration because those who drafted it would not have recognized the distinction we draw today between collective agreements and contracts of hire, then, on the same principles, the exemption should be read as covering only what it was intended to cover, that is, contracts of seamen, railroad employees, and other workers engaged directly in foreign or interstate commerce. It cannot simultaneously be urged that the 1925 exemption should be read as it would have been read in 1925, but that the class of workers affected by the exemption should not be limited to the class of workers intended to be covered by the 1925 language. The workers in this case are not engaged in interstate commerce.

[44] *Id.* at 204.

They are engaged in industry affecting interstate commerce and hence are subject to the provisions of the National Labor Relations Act. If their collective agreement is to be regarded, erroneously, as a contract of employment, it cannot possibly be regarded as covering workers engaged in interstate commerce.

This has been the conclusion of the Second and Third Circuits [45] and we respectfully suggest that, if the conclusion of the First and Sixth Circuits [46] as to the meaning of "contract of employment" is to be rejected, then, on a similar basis, the holdings of the Second and Third Circuits as to the scope of the exclusion should be adopted.

D—***Were it not for the agreement to arbitrate, the District Court would have had jurisdiction.***

Section 4 of the U.S. Arbitration Act provides for a petition to "any U.S. district court which, save for such agreement [to arbitrate], would have jurisdiction" for an order directing that arbitration proceed in the manner provided for in the agreement. The authority of a district court to order arbitration may be argued to depend, under this language, upon whether the district court would have had jurisdiction over the claimed breach of contract under the *Westinghouse* case if there had been no agreement to arbitrate.

Judge Magruder's answer to this argument seems to us to need little amplification. The underlying rationale of *Westinghouse* seems to be that the courts should not be

[45] *Signal-Stat Corp.* v. *Local 475, United Electrical Workers*, 235 F. 2d 298 (2nd Cir. 1956); *Tenney Engineering, Inc.* v. *United Electrical Workers*, 207 F. 2d 450 (3d Cir. 1953).

[46] *General Electric Co.* v. *Local 205, United Electrical Workers*, No. 276 this Term; *Hoover Motor Express Co.* v. *Teamsters Local 327*, 217 F. 2d 49 (6th Cir. 1954); *Local 19, Warehouse Workers Union* v. *Buckeye Cotton Oil Co.*, 236 F. 2d 776 (6th Cir. 1956).

required to handle a potential flood of individual wage claims. Refusal of an order directing that the parties settle such matters by arbitration would have the contrary result of leaving only a suit in court (albeit in a state court) as the remedy for refusal to pay wages.

In any case, even if *Westinghouse* is to be applied in such an inverse fashion, it does not affect the result in this case. Unlike *Westinghouse,* these are not grievances to recover wages alleged to be due to individual employees. The breach of the agreement which they allege is not the failure to pay money, but changes in established work loads and work assignments. The relief which they ask is a reversion to the prior system of work assignment, although in 4 of the 10 cases there is an incidental claim for extra compensation. (R. 20-23).

This kind of a claim is peculiarly a union claim. This is so because changes in work loads and assignments have a much broader effect than the effect upon the particular individuals who occupy the jobs when the changes are made. If unchallenged the changes become part of the established system and will apply to any employee who later may occupy the job. The parties recognized this when, in Article V, they specially provided that in this kind of a case, unlike other cases dealt with in the grievance procedure, a Union grievance as well as an employee grievance could be filed (R. *12*; cf R. *13*). And all of the grievances in this case were in fact union grievances filed by the shop committee and processed as such by the company.

Clearly the *Westinghouse* case does not hold that § 301(a) does not encompass jurisdiction over such claims. And therefore even if the restrictions in *Westinghouse* are to be read, at one remove, as limiting the cases in which the Federal courts will order arbitration, that limitation would not apply here.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the decision of the Court of Appeals for the Fifth Circuit should be reversed and the order entered by the District Court should be affirmed.

Respectfully submitted

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APPENDIX A

STATUTES INVOLVED

Section 301 of the Labor-Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 136, provides, in pertinent part, as follows:

> Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organizations may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

The United States Arbitration Act, 9 U.S.C. §§ 1-14, 43 Stat. 883, re-enacted, 61 Stat. 669, provides as follows:

> § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between the District

of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to Arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order direct-

ing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a fault in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in

filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion.

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance.

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action other-

wise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshall of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the suject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its descretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an ac-

tion in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshall of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment, docketing; force and effect; enforcement.

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected.

This title shall not apply to contracts made prior to January 1, 1926.

The Norris-LaGuardia Act (29 U.S.C. §§ 101-115, 47 Stat. 70) provides, in pertinent part, as follows:

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these

terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value:

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act

* * *

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed

and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the grant of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on conditions that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of

defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant, and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

* * *

Sec. 13. When used in this Act, and for the purpose of this Act—

* * *

(*c*) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

APPENDIX B

(We reprint here the provisions of Article V of the June 27, 1953, agreement between the Company and the Union, exactly as they appear on pp. 8-11 of Exhibit A annexed to the Union's complaint in the District Court. These provisions also appear on pp. 16-19 of the record printed for use of the Court of Appeals and on pp. 11-13 of the record printed in this Court but with, unfortunately, a cumulative succession of typographical errors.)

ARTICLE V

Work Loads And Work Assignments

(A) It is mutually recognized and agreed that the best interests of and the economic security of the Employer and its Employees require that the Employer shall have and maintain reasonable and efficient workloads, machine assignments and work standards based on sound management, engineering principles and practices. In keeping with the foregoing, the Employer may from time to time revise and modify work assignments and/or piece rates and establish new work assignments or rates in accordance with recognized sound engineering principles and practices. It is agreed that piece rates and hourly rates are intended to be based on the full use of an employee's time during his work day, working at the normal operating pace of an average qualified employee with adequate allowance for fatigue and personal needs. The fatigue allowance will be enough so that the average employee can maintain his work assignment day after day without injury to himself. It is also recognized that normal machine or material delays or interferences will be compensated for in the standard. The Union and the affected employees shall have the duty and responsibility to accept workloads, machine assignments and piece rates, either new or changed, established in keeping with the above principles, and to cooperate fully with the Employer in giving said work assignments and piece rates a fair test. The procedure which will be followed is as follows:

(B) The Employer shall, upon written notice, have the right to change or modify existing work assignments

or piece rates and to establish new assignments or piece rates within the principles set forth in Paragraph (A) above. It is agreed that routine, minor, or day to day changes in methods, processes, or facilities on hourly paid jobs shall not be regarded as work assignment changes within the meaning of this Article; nor shall routine changes or mechanical corrections necessary to carrying out a scheduled program in connection with piece workers be considered a work assignment change within the meaning of this Article.

As has been done under prior Agreements the Employer will furnish the Union such information as may be available in order that the Union be aware of the changes made by the Company and the basis therefor, and the Company will give the employees such instruction as is necessary.

It is further agreed that when the changes are made effective, the employees will cooperate and perform to the best of their ability in order to give the change or modification a reasonable and fair test.

The first four (4) weeks immediately following the effective date of change or installation will be considered a trial period. During the first four (4) weeks of this trial period, the employees will be paid not less than their former average hourly earnings as provided in Paragraph (D) of this Article. By mutual agreement, the trial period may be extended beyond the four-week period, with or without a guarantee of average earnings.

(C) Any affected employee or the Union may file a grievance within two (2) weeks after the end of the trial period. If no grievance has been filed at the end of that time, the change or modification shall be considered established. If the Union feels that a rate for the changed assignment or workload of an hourly paid worker is out of line with that paid on other jobs with comparable workloads or assignments, it may raise such question as a grievance if it cannot be adjusted by negotiations.

(D) Piece rates may be fairly adjusted by the employer in connection with work assignment changes. In such case the new rates shall be set to yield average hourly earnings for the group on the new work assignment which are not less than the average straight time hourly earn-

ings of the group on the old work assignment for the last Social Security Quarter which precedes the notice of change, except in cases in which the workload is found to be clearly out of line with the workload standards of the Employer heretofore found satisfactory or with other satisfactory workloads in the plant.

(E) In the event of an arbitration in which the Employer presents detailed standards based on adequate studies, the Board of Arbitrators shall give major consideration to the Employer's standards and studies (and their adequacy as measured by Paragraph (A) of this Article) to gether with the Union's objections to the validity of said standards and studies. If they order a change in the work assignment or piece rates they shall do so by specific reference to the factors in the Employer's standards which are found to be out of conformity with Paragraph (A), or improper, and shall clearly state the basis of such findings.

(F) It is further agreed that the Board of Arbitration shall have the right to adjust compensation retroactive to the date of the change.

(G) Any dispute arising from the operation or interpretation of Article V shall be subject to the grievance procedure up to and including arbitration.